No. 10782

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

HERMAN ROSENWASSER, an individual doing business under the firm name and style of PERFECT GARMENT COMPANY,

Appellee.

APPELLANT'S OPENING BRIEF.

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TABLE OF AUTHORITIES CITED.

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APPELLANT'S OPENING BRIEF.

By an Information filed January 25, 1944, by the United States Attorney in and for the Southern District of California, Central Division, the appellee herein was charged with violation of Title 29, U. S. C. A. Sections 15 (a) (1), 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938 [R. 5 to 31]. The Information contained fifteen counts which charged the defendant with a violation of the record keeping, minimum wage, overtime, and interstate shipment provisions of the Fair Labor Standards Act of 1938 (29 U. S. C. A. 201 *et seq.*).

The defendant filed a motion for a Bill of Particulars, and demurred to the Information on the ground that "The said counts of the said Information fail to disclose and it cannot be ascertained therefrom whether the alleged em-

ployees of the defendant were employed and working at a regular rate of pay, subject to the provisions of the Act, or working on a piece work basis at an irregular rate of pay."

The defendant also filed a motion to suppress and return the evidence, which was supported by the affidavit of the defendant. The District Judge granted, in part, the motion for Bill of Particulars, and postponed his ruling on the demurrer until after the filing of the Bill of Particulars, and thereafter sustained the demurrer with respect to certain counts of the Information. The Court also granted the Motion to Suppress and Return the Evidence, which is the order of the Court appealed from by this appeal.

The Motion to Suppress the Evidence is set forth in its entirety [R. 32, 33]. The affidavit of the defendant, Herman Rosenwasser, in support of the Motion to Suppress the Evidence, is in the Record, pages 35 and 36. The order suppressing and returning the evidence is shown on pages 39 and 40 of the Record.

The oral hearing on the Motion to Suppress the Evidence came before the Court on the 6th day of March, 1944, and thereafter a formal written order was made and entered on the 27th day of March, 1944.

The Information in this case is a re-filing of a prior identical information against the same defendant (S. D. Cal. No. 16152—Criminal) in which there had been a verdict of guilty on six counts submitted to the jury but the District Judge on January 10, 1944, granted the defendant's motion for a new trial.

All of the evidence referred to in the Motion and Order to Suppress had been previously introduced at the trial of the original case, and this explanation is made to clarify

for the Court the references contained in the Motion to Suppress and the Order based thereon.

The matter is now before this Honorable Court upon appeal from the order suppressing and directing the return of the evidence.

Jurisdictional Statement.

(a) The District Court had jurisdiction under the provisions of Section 41 (a) of Title 28 of the United States Code.

(b) Under Section 546 of Title 18, United States Code, the crime with which defendant was charged is cognizable in the District Court.

(c) This Court has jurisdiction by virtue of the provisions of Section 682 of Title 18, United States Code, as well as the provisions of Section 345 of Title 28, United States Code.

STATUTE INVOLVED

The Fair Labor Standards Act of 1938, 29 U.S.C.A. 201 et seq. in its pertinent and applicable parts, provides:

"The Administrator or his designated representatives * * * ma enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investi gate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act."

Specification of Errors.

The District Court erred in granting defendant's Motion to Suppress and Return the Evidence, and committed prejudicial error in the following particulars:

(1) The Court erred in granting the motion of defendant to suppress and return the exhibits for the reason that

the said exhibits had been previously offered in evidence and admitted in the trial of Case No. 16152, United States v. Herman Rosenwasser, and were no longer in the possession of the United States Attorney's office and therefore the United States Attorney had no power to return the evidence to the defendant.

(2) The Court erred in making and entering the order suppressing the evidence and ordering the return thereof for the reason that the admissibility of said evidence had been determined in the previous trial of the case and the question of its admissibility was, therefore, *res adjudicata* and became the law of the case.

(3) The Court erred in granting the Motion to Suppress and ordering the return of the evidence for the reason that the affidavit in support of said motion did not show an illegal or unreasonable search and seizure or any search and seizure at all, but affirmatively showed the voluntary surrender by the defendant of the records requested of him by the investigating officers of the Wage and Hours Division of the Department of Labor.

(4) The Court erred in directing the transfer to defendant of the photostatic copies of said exhibits for the reason that the said photostatic copies were the property of the United States and had never been the property of the defendant.

(5) The Court erred in permanently enjoining the representatives of the United States Government and in particular the Wage and Hours Division thereof, from making any use of the photostats or information derived therefrom in any other proceeding whatever either civil or criminal thereby converting a motion to suppress into an independent bill in equity, and making a final order therein.

ARGUMENT.

I.

The Court Erred in Granting the Motion of Defendant to Suppress and Return the Exhibits for the Reason That the Said Exhibits Had Been Previously Offered in Evidence and Admitted in the Trial of Case No. 16152, United States v. Herman Rosenwasser, and Were No Longer in the Possession of the United States Attorney's Office and Therefore the United States Attorney Had No Power to Return the Evidence to the Defendant.

In support of this point the appellant directs the attention of the Court first, to the Motion to Suppress the Evidence filed in the District Court, which Motion is found on page 32 of the Record, and by its terms shows that the evidence sought to be suppressed had been previously introduced as Government exhibits in the prior trial of the case. The evidence is referred to as exhibits and exhibits for identification, and further referred to their numerical order, and the title of the case is given as well as the number. This showing in the motion, therefore, raises the question, first, as to whether or not the Court could order the United States Attorney to return the evidence because the motion itself shows that the evidence sought to be suppressed and returned is not only no longer in the custody of the United States Attorney but is actually in the custody of the Clerk of the United States District Court as evidence in the previous trial of the same case, and it would be beyond the power or authority of the United States Attorney to in any way command or control the Clerk of the United States District Court.

The affidavit on which the motion was made shows that the evidence sought to be suppressed and returned came into the possession of Agents of the Wage and Hours Division of the United States Department of Labor and not into the possession of the United States Attorney in the first instance.

Paragraph three of the Motion does not allege, as it could not allege, that the evidence sought to be suppressed and returned is even in the custody of the United States Attorney and the affidavit on which the Motion was made does not show on its face any unreasonable search or seizure.

What has been said so far clearly demonstrates that the first assignment of error is well taken and that the matter is *res judicata.* Assuming that the affidavit of Herman Rosenwasser as to how he surrendered the documents to the Wage and Hours Division is correct, the affidavit and motion show that there was a previous trial against this same defendant concerning the subject matter and in which the evidence was offered and admitted. Either the defendant objected to its introduction at the previous trial and his objection was overruled, or the evidence was offered by the Government and introduced without objection. In either instance it went into evidence, and a decision as to its admissibility was made by the Court. Such a ruling precludes the defendant from thereafter having a second ruling on the same point because if in the previous trial he had objected and his objection been overruled, or if he had made a motion to return and the motion was denied, such rulings would have been appealable by the defendant either before trial or after a verdict rendered against him.

This view of the situation is amply supported by the decision of the United States Supreme Court in the case

of *Steele v. United States,* 267 U. S. 498, and 267 U. S. 505.

The first appeal was from the order denying a petition of the defendant for an order vacating a search warrant. It was found by the Court that the search warrant was properly issued upon probable cause and the action of the lower court in refusing to vacate the search warrant was sustained. After the mandate on this appeal was sent to the trial court, the defendant was tried and convicted and thereafter took a direct writ of error to the Supreme Court in which he urged as grounds for appeal the competency of the evidence gained as a result of the search made under the search warrant, and also raised the question that the search warrant was issued to a general Prohibition Agent whereas Section 6 of Title II of the National Prohibition Act of June 15, 1917, said that such a warrant must be issued to "a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof," and argued from this that a Prohibition Agent appointed by the Commissioner of Internal Revenue is not a civil officer of the Government in a constitutional sense.

Concerning these two questions, the Supreme Court, speaking through Mr. Chief Justice Taft, said:

> "It should first be said that Steele is not in a position to raise this question. He might have raised it in the preceding case, but he did not do so and did not assign error on account of it in his appeal to this Court. *The refusal to vacate the search warrant and to return the liquor seized was a final decree.* The question is, therefore, *res judicata* as against him." (Emphasis added.)

It is to be noted that the first appeal referred to in the quoted language was from a judgment of the District Court refusing to vacate a search warrant and the appeal was direct from that order refusing to vacate, and the opinion does not disclose the state of the record before the District Court, namely, whether an indictment had been filed against the defendant or whether he filed a special proceeding or a Bill of Equity before indictment was filed against him. In any event, appellant deems this lack of clarity in the record to be immaterial for the reason that which ever way the question was raised in the *Steele* case, the holding that the matter was *res judicata* would have been made in any event.

II.

The Court Erred in Making and Entering the Order Suppressing the Evidence and Ordering the Return Thereof for the Reason That the Admissibility of Said Evidence Had Been Determined in the Previous Trial of the Case and the Question of Its Admissibility Was Therefore Res Adjudicata and Became the Law of the Case.

This point is very closely associated with the previous point and whatever has heretofore been said is equally applicable under this heading, but we will make further observations and cite other authorities more in keeping with the facts in the instant case.

We direct the attention of the Court to the case of *Lisansky v. United States,* 31 F. (2d) 846, which was an appeal by a defendant convicted of a conspiracy to violate the law, and in which the Government produced photostatic copies of certain records and documents procured in much

the same manner as were the documents in the instant case. The Court in that case said.

> "The books were shown to be in the possession of the defendants; and, because of the provisions of the Fourth and Fifth Amendments, the court was without power to require their production at the trial. And it was not permissible for the Government even to lay the foundation for the introduction of copies of the books, as in civil cases, by making demand for their production in open court or by introducing in evidence notice of such demand. But evidence as to the contents of books and papers is not lost to the Government because the defendant has them in his possession and their production cannot be ordered or the usual basis laid for the introduction of secondary evidence. * * *"

> "The rule applicable in such cases was well stated by Mr. Justice Day, then a Circuit Judge of the Sixth Circuit, in the McKnight case, as follows:

> "'The authorities seem very clear that in such cases, where a criminating document directly bearing upon the issue to be proven is in the possession of the accused, the prosecution may be permitted to show the contents thereof, without notice to the defendant to produce it. * * * As the introduction of secondary evidence of a writing in such instances is founded upon proof showing the original to be in the possession of the defendant, it will ordinarily be in his power to produce it, if he regards it for his interest to do so.'

> "And there is nothing in the point that this evidence was obtained in violation of the Fourth and Fifth Amendments to the Constitution. There was no search or seizure of the books of defendant, nor was their production compelled by any legal process.

> On the contrary, the defendants voluntarily showed them to the Government agents and left them in their possession for auditing. We know of nothing in the Constitution, or elsewhere, which would prevent the agents from testifying to knowledge acquired while auditing them. The cases cited by defendants, such as Gouled v. U. S., 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647, and Henderson v. U. S. (C. C. A. 4th), 12 F. (2d) 528, 51 A. L. R. 420, lay down sound propositions of law, but are so clearly inapplicable to the facts of this case that we deem it unnecessary to distinguish them. See Olmstead v. U. S., 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944, and Hester v. U. S., 265, U. S. 57, 44 S. Ct. 445, 68 L. Ed. 898."

The last quoted paragraph of the above citation is, we think, particularly applicable in this case, because it is a definite holding that to permit such testimony would not be a violation of the Fourth and Fifth Amendments to the Constitution, and such language is equally applicable to the situation as shown by the affidavit of the defendant in this case because the affidavit makes it very clear that he voluntarily surrendered his books and documents to the Government agents, and while in their possession with his consent, the photostatic copies were made.

Another case, that of *Rocchia v. United States,* 78 F. (2d) 966, decided by this Circuit in August, 1935, also supports the position of the Government in regard to the introduction of the photostatic documents.

It would appear from the reading of that case that Rocchia was arrested for a violation of the National Prohibition Act, and certain evidence, including documentary evidence, was taken by the officers at the time of the arrest. In a hearing before the Commissioner, after the arrest, the Commissioner ordered the evidence returned on the

ground that the search was unlawful. Thereafter, apparently the District Court also made an order directing the return of the evidence to the defendant. Whether this order was made in a special proceeding or in a previous action is not quite clear from the opinion. At page 970 of the opinion we find as follows:

> "The indictment was returned in this case on November 14, 1933. On December 23, 1933, appellant made a motion to suppress the evident. This motion was heard January 6, 1934. The motion to suppress was amended February 2, 1934; on February 3rd the amended motion was denied; thereafter, on February 10, 1934, the appellant pleaded not guilty and the case was called for trial June 26, 1934."

Immediately following the above quotation in the opinion, is the following reference to the previous proceeding, but from it we cannot determine the nature of the previous proceeding:

> "Neither in the original motion to suppress the evidence nor in the amended motion was the effect of the order of the District Court made in the previous proceeding directing the return of the evidence to the appellant presented to the trial court. If the question of the effect of the previous order had been raised on the motion, it would be necessary to determine whether or not the former order was *res judicata* as to the unlawfulness of the search and seizure. Not having been presented at that time, the attempt to raise the question at the trial by way of objection to the evidence was too late."

We think the above quoted language is particularly pertinent because, as we have heretofore argued, both the motion and the order granting the motion each show that

the evidence was previously introduced in the trial of the defendant on identically the same charges. Therefore, the character of the previous proceedings and the nature of the evidence was brought before the Court in the previous trial as well as on the motion to suppress, and there can be no question but what the matter is *res judicata* because the affidavit in support of the motion shows the original voluntary surrender of the documents by the defendant, and does not even hint or suggest that there was another or different taking by the Government.

III.

The Court Erred in Granting the Motion to Suppress and Ordering the Return of the Evidence for the Reason That the Affidavit in Support of Said Motion Did Not Show an Illegal or Unreasonable Search and Seizure or Any Search and Seizure at All, but Affirmatively Showed the Voluntary Surrender by the Defendant of the Records Requested of Him by the Investigating Officers of the Wage and Hours Division of the Department of Labor.

An examination of some of the authorities previously cited under the other specifications shows that they have some applicability to the question of the affirmative showing that, in this case, the evidence sought to be returned was voluntarily surrendered and, therefore, there was no search or seizure whatever.

Whenever the question of the return of property or the suppression of evidence has been before the Court for consideration, invariably the motion for the return or suppression has been grounded upon an alleged violation of the constitutional rights of the defendant under the Fourth and Fifth Amendments to the Constitution, and

the courts have been ever zealous to protect the constitutional rights of the citizens. The fact that these decisions have all been made upon constitutional grounds gives a certain pattern to the whole law of search and seizure, and therefore the decisions of the Court are to that extent but amplication or extension of the pattern established by the facts of each case when fitted into constitutional rights.

Unfortunately few, if any, of the decisions turn on the question of the voluntary surrender of the evidence and, therefore, every decision in which the Court has found a violation of constitutional rights it has ordered a return of the property to the defendant, or its suppression, and in most of the decisions the appeal has been taken by the defendant from an order of the District Court denying him the relief sought. These appeals have sometimes been taken from orders made in special proceedings, but usually are appeals after convictions. Therefore, the question of the appealability of an order made in favor of the defendant and against the Government has sometimes, particularly in the *Marquette* case, 270 Fed. 214, not been given the full consideration which the point deserves, but has been decided on the basis of language found in prior opinions discussing constitutional questions raised by a defendant and not by the Government, and thus we feel the character of such an order made against the Government has not been fully considered and there is no firm foundation for holding it to be interlocutory.

The case of *Carroll v. United States,* 267 U. S. 132, carefully reviewed all prior decisions on search and seizure, and redeclared all fundamental principles with respect to search of buildings and outbuildings, and then announced the doctrine that would be applicable to automobiles and other mobile property of a defendant. This decision very carefully distinguished the difference be-

tween these two classes of property and also re-announced, what is sometimes forgotten, namely, that the constitution does not denounce all searches and seizure but only such as are unreasonable.

Bearing in mind the voluntary character of the surrender of the documents in the instant case and that the affidavit does not show anything unreasonable in the act of the Government agents in appearing at the place of business of the defendant, we come now to a consideration of the order, itself, to see if it can be truly held that it is interlocutory in character.

The order provides that exhibits and exhibits for identification in the previous case between the same parties be returned, and all photostats, copies or data secured therefrom or information obtained therefrom, directly or indirectly, are forever suppressed. This, we think, is beyond the power of the court to do. Clearly, the photostatic copies of the records were never the property of the defendant, and if they were not unlawfully obtained the Government is entitled not only to their possession but to their use in any lawful manner, and any order depriving it of such use under the circumstances constitutes an injunction from which an appeal lies. It also is a determination of property rights without due process of law which would make the order void instead of voidable. A void order may be said to be no order at all, and the only way the Government can protect its rights under the circumstances is by direct appeal. The order further provides that the agents of the Wage and Hours Division of the Government, and all other persons, must forthwith return the photostatic documents to the defendant, which part of the order is also a determination of the title and right of possession of the property and constitutes a con-

fiscation of Government property without process of law and is, therefore, a final order from which an appeal will lie.

The facts in this case are so distinctly different than the facts in any of the other decided cases, whether in this Circuit or in the United States Supreme Court, that we feel that no prior decision sets forth the true rule or principle which is applicable herein and which would in any way defeat the consideration of this appeal on its merits.

IV.

The Court Erred in Directing the Transfer to Defendant of the Photostatic Copies of Said Exhibits for the Reason That the Said Photostatic Copies Were the Property of the United States and Had Never Been the Property of the Defendant.

In discussing this specification we will quote from the *Rocchia* and *Lisansky* cases, used in another heading but the quotations will have particular reference to the fact that the evidence sought to be suppressed was photostatic copies of documents.

The *Lisansky* case involved the question of photostatic evidence and concerning it the Court said:

> "The next point strenuously insisted upon by defendants is that the trial court erred in allowing agents of the government to testify as to the contents of books and records of defendants, and in permitting photostatic copies of certain pages of these to be introduced in evidence. The basis of these objections is, first, that the oral testimony and the photostatic copies were received in violation of the best

evidence rule; and, second, that the evidence was obtained in violation of the rights of defendants under the Fourth and Fifth Amendments to the Constitution. We see nothing in either of these points."

In the *Rocchia* case the same question of the introduction of photostatic copies was discussed, and there this Circuit said as follows:

"During the trial the appellant objected to the introduction of photostatic copies of documents that had been taken from his possession upon the ground that they had been obtained by an unlawful search and seizure. In making this objection counsel offered to prove in support thereof that the property had been ordered returned by the District Court on January 30, 1933, prior to the return of the indictment in the case at bar, and after a preliminary hearing before the Commissioner at which the Commissioner determined that it had been obtained by an unlawful search and seizure and dismissed the appellant, and that the search there involved was the identical search involved herein. This objection was in effect a renewal of the motion to suppress the evidence which had been previously denied by the trial court. * * *"

"The appellant also objected to these photostatic copies on the ground that they are not the best evidence. The objection being based partly upon the ground that the original papers had been returned to appellant and were not in the possession of the Government was in effect a statement that they were in his possession and not in the possession of the Government. That being true, secondary evidence was admissible in the absence of a tender of better evidence by appellant."

V.

The Court Erred in Permanently Enjoining the Representatives of the United States Government and in Particular the Wage and Hours Division Thereof, From Making Any Use of the Photostats or Information Derived Therefrom in Any Other Proceeding Whatever Either Civil or Criminal, Thereby Converting a Motion to Suppress Into an Independent Bill in Equity, and Making a Final Order Therein.

Under this heading appellant will first analyze all of the authorities usually cited on appeals by defendants from orders denying a motion to suppress and return the evidence.

Turning first to the case of *Cogen v. United States*, 278 U. S. 221, we see that this was an application after indictment and before trial for an order for the return of papers and to suppress evidence on the grounds of an unlawful search and seizure. The application was denied in the District Court and the defendant sued out a writ of error in the Circuit Court of Appeals which dismissed the writ, holding that the order sought to be reviewed was an interlocutory order. The Supreme Court granted a writ of *certiorari* for the purpose of deciding whether or not the order of the District Court was a final order within the meaning of Section 128 of the Judicial Code.

In resolving the question the Supreme Court reviewed practically all the prior authorities such as *Gouled v. United States*, 255 U. S. 298; *Agnello v. United States*, 269 U. S. 20; *Panzich v. United States*, 285 F. 871; *Weeks v. United States*, 232 U. S. 383; *Marron v. United States*, 275 U. S. 192; and many others, and came to the conclusion that the order appealed from was an interlocutory or-

der and held that the Circuit properly dismissed the appeal.

There are, however, two or three distinctive facts about the instant case which differentiates it from any of the foregoing cited authorities. It will first be noted that most of the cited authorities have been cases where the defendant suffered an adverse ruling in the lower court. Therefore, it is clear that as to the defendant it is not a final order but one from which he has in many instances a further opportunity of objection and, if convicted, an appeal by which to review the action of the District Court. Such right does not exist in the instant case on behalf of the Government, that is the right to proceed to trial and in the event that the defendant goes free, to take an appeal. This distinction in itself, we feel, is sufficient to differentiate the cases so far as to make necessary a different rule. We are not unmindful that this Circuit in the case of *United States v. Marquette,* 270 F. 214, has come to a contrary ruling, but there are points of difference between the *Marquette* case and the instant case in two significant particulars. First, in the *Marquette* case, the officers of the Government, without search warrant or authority, forcibly made their way into a private home and seized and carried away intoxicating liquor. Second, there was no prior ruling on the admissibility of the evidence as there is in the instant case; therefore it is felt that the *Marquette* case is not an authority for the ruling of the District Court in the instant case.

In the present case, as has been pointed out, the defendant voluntarily surrendered the original documents to the agents of the Government, so the position by the Government agents was not founded upon an unlawful invasion of the home or the lack of a search warrant, or

the abuse of any process of the court. The admissibility of the evidence which was suppressed by the trial court had been previously determined in a trial of the identical charges, and the evidence which was suppressed was not the primary evidence which was voluntarily surrendered but secondary evidence of a photostatic character. There having been a prior ruling, the Government feels that the matter is *res judicata* and the order made by the District Court appealable as such.

In the *Marquette* case we cannot help but feel that the holding of this Circuit was predicated primarily upon the violation of the constitutional rights of the defendant by the forcible invasion of his home rather than upon the proposition that the order was an interlocutory one.

There can be but little doubt that an order suppressing the evidence and ordering the return thereof, under the situation shown by this record, is a final order because it substantially deprives the Government of any opportunity whatever of presenting its case. The charges are of a character that the documentary proof thereof is necessary. Obviously, the Government agents would have no knowledge of the defendant's books and other matters shown by the exhibits, unless such information was acquired from the documents themselves in their original form, or from photostatic copies made therefrom, and the sweeping nature of the order precludes the Government witnesses from making any use, whatsoever, of the exhibits, and unless the order of the court is vacated and set aside and held for naught the prosecution of the charges cannot go forward and the finality of the order becomes apparent.

By way of further strengthening the appellant's position that the order herein appealed from is a final order

and not an interlocutory one, we will cite two authorities on the question of *res judicata,* because the appellant feels that if the order in the former trial of the same issues is binding upon the defendant, the order clearly is not an interlocutory order but a final one, and the question of its appealability clear.

In the case of *United States v. California Bridge Company,* 245 U. S. 337, the court had before it for consideration a civil suit concerning the effect of a judgment and whether or not the principle of *res judicata* applies. In disposing of the matter the Court said:

> "The doctrine of estoppel by judgment, or *res judicata,* as a practical matter, proceeds upon the principle that one person shall not a second time litigate, with the same person or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue, which has been necessarily tried and finally determined, upon its merits, by a court of competent jurisdiction, in a judgment in *personam* in a former suit."

Clearly, the right of the Government to introduce this evidence falls within the language above quoted. It is precisely the same question. The evidence is exactly the same. It involves the same investigation by the same officers, and the court in the first instance was competent to pass upon it. Therefore, we say, having passed upon it in the former trial, the matter is *res judicata,* and the nature of the interlocutory character of the order, if up for the first time, is not present.

Another case decided by the Seventh Circuit in which *certiorari* was denied in the Supreme Court is that of *Orient Ins. Co. v. Leonard,* 120 Fed. 808, *certiorari,* de-

nied, 187 U. S. 645. This action was based upon a fire insurance policy and was tried in the District Court, and appealed to the Circuit where the holding of the District Court was reversed and the matter retried and the citation is to the second appeal. In this case the court said:

> "Now, when Mr. Leonard, on the second trial, again produced evidence that an explosion in the neighboring mill made a hole in the wall, through which the fire ensuing upon and connected with the explosion entered, and destroyed his stock, the court was not at liberty to follow its own or counsel's view of the law in ruling on the company's motion for a directed verdict in its favor. The law of the case, determined by the former decision, required the denial of the motion, and the submission of the evidence to the jury."

Appellant believes that there exists a proper basis in the present case for an appeal to this Circuit because by the Court's order directing the transfer to defendant of the photostats which were the property of the United States and had never been the property of the defendant, the District Court did, in fact, assume jurisdiction for the purpose of trying title or right of possession. Appellant believes that the District Court went further than that and, in fact assumed jurisdiction to permanently enjoin the representatives of the Wage and Hour Division from making any use of the photostats, or any information derived therefrom, in any other proceeding of whatever character, whether civil or criminal. In doing this appellant believes that the District Court went beyond the scope of the motion to suppress; the court assumed a jurisdiction which appellant does not feel can be regarded as incidental to an interlocutory order in a criminal proceeding; the effect of the order of the court is to convert a

motion to suppress into an independent bill in equity and such order would be a final order against appellant whether the criminal proceeding is continued any further or not.

We again refer the Court to the case of *Steele v. United States,* 267 U. S. 498, where the Court directly held that the refusal to vacate a search warrant and return property at the request of a defendant was a final decree. And finally, we refer the Court to the case of *Dowling v. Collins,* 10 Fed. (2d) 62 (C. C. A. 6), *certiorari* denied, 46 S. Ct. 356, which was an original suit by a defendant in a pending criminal proceeding, seeking the return of property allegedly seized by the officers and the quashing of certain search warrants and the return and suppression of the physical evidence. In disposing of this case on appeal, the Circuit reviewed the facts shown in the criminal proceedings from which it appears that after the arrest of the defendants a motion to suppress the evidence was made in the District Court and the motion denied. Thereafter, and before empaneling a jury for a second trial, the defendants again moved the court by a written motion to quash the search warrants and to return the liquor to one of the defendants allegedly the rightful owner thereof. This motion was also denied, and thereafter the original suit was brought, which is discussed in the appeal.

After reciting the facts substantially as outlined, the court said as follows:

> "We do not consider whether or not the statement in the certificate of evidence before us must be taken to mean that the written motion in the criminal case before the first trial was supplemented by an oral motion for the return of the goods seized; clearly the written motion passed on before the sec-

ond trial specifically prays for this relief. Further, it is immaterial whether or not the court erred in considering the order denying the original motion as *res adjudicata* on this broader motion. * * *

"The preliminary motion to suppress the use thereafter in that pending criminal case of certain evidence charged to have been illegally obtained is distinct and separate from the motion for the return of the goods charged to have been illegally seized; by joining them together the order denying the return of the goods is no less final, because the order denying the suppression of their use as evidence may be interlocutory.

"The parties, moreover, had a choice of remedies between the present proceedings and the motion in the criminal case for a return of the goods. They chose the latter; they submitted the issues thereon to the trial judge; on the merits they were denied the relief sought in the first instance, and were deemed barred thereby in the second attempt. That second action was final; and, if the first motion can be deemed by an agreement of the parties to have included the return of the property, the order thereon was likewise final."

If we analyze the above quoted language carefully, we readily see that the Sixth Circuit here made a definite holding that where goods are allegedly wrongfully seized by the Government and a prosecution is started, the defendants have a choice of proceeding either by motion or by original suit for the return of the property, and whichever choice they make results in a final order from which an appeal lies. In this instance the order being against the defendant, the court held that as the order was final the defendants could appeal. We can perceive no good

reason why, had the order been in favor of the defendant and against the Government, its finality would not be the same and consequently the Government would have a right to appeal.

This position of the appellant is further strengthened by the following comment of the court in the same case:

> "The reasoning of the opinion in *Perlman v. United States,* 247 U. S. 7, as well as in *Burdeau v. McDowell,* 256 U. S. 456, fully supports the conclusion that the orders on the preliminary motions and petitions in the criminal case were final and as such reviewable in this court; though entitled in that criminal case, they were no essential part of the trial therein. * * *"

For the foregoing reasons, appellant urges the reversal of the action of the District Court.

Respectfully submitted,

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